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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

YOUNG AMERICA MORTGAGE  
CORP.,

Defendant and Appellant,

v.

SUPERIOR COURT OF THE COUNTY  
OF LOS ANGELES,

Respondent,

ING BANK, FSB, a Delaware corporation,

Plaintiff, Respondent and Real Party  
in Interest

B219955

(Los Angeles County  
Super. Ct. No. BC398236)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Elizabeth A. White, Judge. Reversed and remanded.

Russell J. Thomulka, for Defendant and Appellant.

Hicks Park, James B. Hicks and Gary W. Park, for Plaintiff and Respondent ING Bank, FSB.

## **INTRODUCTION**

Appellant Young America Mortgage (YAM), a mortgage broker, submitted a loan application to Respondent ING Bank on behalf of its client, Jorge Ramon. Several months after the loan was approved, ING discovered that the application misstated Ramon's monthly salary. Ramon later defaulted on the loan and ING sued Ramon and YAM for breach of contract, fraud and negligence. ING filed a motion for summary judgment arguing that, by failing to verify Ramon's salary information, YAM had breached the parties' Broker Origination Agreement and committed fraud. The trial court granted the motion and entered judgment against YAM.

YAM appeals, arguing that: (1) the parties' contract did not require YAM to verify Ramon's income information; (2) ING failed to introduce evidence establishing that it was damaged by YAM's alleged breach of contract, and; (3) there is a triable issue of fact regarding whether YAM knew or should have known that Ramon misstated his salary information in the loan application. We reverse the trial court's grant of summary judgment, concluding that ING has failed to introduce evidence demonstrating that there is no triable issue of fact regarding any of its claims.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Events Proceeding ING's Complaint**

In 2005, Appellant Young America Mortgage (YAM) and Respondent ING Bank entered into a "Broker Origination Agreement" under which YAM "solicit[ed] prospective Borrowers for residential mortgage loans" and ING, "upon approval of the application, fund[ed] such Loans." The Agreement included a provision stating that YAM would not "submit a Loan Application Package where the information contained in the application . . . is not true, correct and undisputed and does not reflect full, correct and accurate information as the matter represented . . ." The Agreement further provided that if any representation regarding a loan failed to be true, YAM would "immediately repurchase, on demand, any Loan which may be affected by such failure."

In 2007, YAM submitted a loan application to ING on behalf of Jorge Ramon, who was seeking to refinance a residential mortgage initially provided by Chase Manhattan Mortgage. The application, which was signed by Ramon, stated that his monthly salary was \$5,761. Ramon later provided YAM an earnings statement that verified the amount of his salary, which YAM then gave to ING.

After reviewing Ramon's loan application and supporting documentation, ING approved a loan for \$328,500 and paid YAM a broker fee of approximately \$8,000. On June 19, 2007, Ramon executed a promissory note agreeing to repay the loan, along with a deed of trust that gave ING a first priority security interest in Ramon's property.

In February of 2008, Ramon stopped making his required monthly loan payments. Several months later, Ramon requested that ING modify the terms of the loan. As part of its loan modification process, ING obtained copies of Ramon's 2006 and 2007 federal and state tax returns and discovered that his income for that time period was approximately one third the amount stated in his loan application.

After discovering the income discrepancy, ING sent a letter to YAM stating that it had breached the parties' Broker Origination Agreement by submitting a loan application which contained false salary information. ING's letter further stated that, under the parties' Agreement, YAM was required to repurchase the loan from ING. YAM did not respond to the letter.

## **B. ING's Complaint and Trial Court Proceedings**

In September of 2008, ING filed an action against Ramon and YAM alleging breach of contract (both defendants), fraud (both defendants), judicial foreclosure (Ramon only), negligence (YAM only) and unfair business practices (YAM only). All of the claims were predicated on Ramon's misrepresentation of his monthly salary.

During discovery, YAM's president and manager, Fariborz Nouri, testified that YAM did not know Ramon's loan application and earning statement misstated his salary until ING notified it of the misrepresentation. Nouri also stated that while processing the loan application, YAM never asked Ramon if his application and earning statement

accurately reflected his current income or take any other actions to verify Ramon's salary.

On May 8, 2009, ING filed a motion for summary judgment or, alternatively, summary adjudication, arguing that because Ramon and YAM had admitted that the loan application included inaccurate salary information, there was no triable issue of material fact regarding any claim asserted in its complaint. First, ING argued that, by submitting a loan application that falsely stated the borrower's salary information, YAM had breached the Broker Origination Agreement and Ramon had breached his loan agreement. Second, ING argued that both parties committed fraud because the undisputed evidence showed Ramon knowingly misrepresented his salary information and that YAM acted recklessly by submitting "a false loan application . . . without regard for the truth of the [salary] information." ING further contended that YAM's submission of a false loan application violated various federal and state statutes, and therefore constituted negligence as well as an unfair business practice within the meaning of Business and Professions Code section 17200. Finally, ING contended that it was entitled to foreclose on Ramon's property.

After the motion was filed, Ramon settled with ING and was dismissed from the case. The record does not state the terms of the settlement nor does it indicate whether ING permitted Ramon to retain possession of the property that was used to secure the loan.

YAM filed an opposition to ING's motion for summary judgment, arguing that although Ramon had misstated his monthly salary, triable issues of fact remained on each of ING's claims. First, YAM contended that the Broker Origination Agreement did not require it to verify the accuracy of Ramon's salary and therefore ING had not established any breach of the contract. YAM also argued that ING had failed to show that it was damaged by any breach because it had provided no evidence regarding the value or status of the property that had been used to secure Ramon's loan. YAM asserted that, without such evidence, it was impossible to determine whether ING could recoup the full benefit of its loan agreement by foreclosing on the property. In regards to ING's fraud, negligence and unfair business practice claims, YAM asserted that ING was required to

prove that YAM knew or should have known that Ramon misstated his salary, which involved a triable issue of fact.

The trial court granted ING's motion for summary judgment, concluding that it had introduced sufficient evidence to prove YAM knowingly submitted a false loan application. On the contract claim, the court ruled the parties' Agreement imposed on YAM an absolute duty to submit accurate loan application materials, which it had failed to do. It further concluded that ING had demonstrated contract damages "in the amount of the loan plus fees paid in connection with the loan." The court did not address whether or how ING's deed of trust to Ramon's property affected its damages.

The court also ruled ING was entitled to summary judgment on its fraud claim because YAM had admitted it failed to "take any steps to review the information contained in the loan application." In the court's view, this admission demonstrated "recklessness giving rise to the elements of knowledge and intent." Finally, the court concluded ING had established that YAM committed negligence and engaged in an unfair business practice by submitting a false loan application in violation of federal and state law.

The court entered judgment in favor of ING and awarded the outstanding amount of the loan principal (\$326,176.23), in addition to outstanding interest and late charges. It also awarded ING all the fees it had paid to YAM for originating the loan, along with prejudgment interest. YAM timely appealed the judgment.

## **DISCUSSION**

### **A. Legal Standards Governing Motions for Summary Judgment**

"The standard for deciding a summary judgment motion is well-established, as is the standard of review on appeal." (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 572 (*LeVine*).) A party is entitled to summary judgment if there is no triable issue of material fact and the party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any

triable issue of material fact.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) Where plaintiff is the moving party, this initial burden requires it to produce evidence showing that each element of each cause of action has been established. (§ 437c, subd. (p)(1).) If a moving plaintiff satisfies this initial burden, the burden shifts to the defendant to set forth “specific facts” showing that a triable issue of material fact exists as to the cause of action or a defense. (*Ibid.*; see also *Aguilar, supra*, 25 Cal.4th at p. 850.) “Despite the shifting burdens of production, the . . . moving party[] always bears the ultimate burden of persuasion as to whether summary judgment is warranted. [Citations.]” (*Garcia v. W & W Community Development, Inc.* (2010) 186 Cal.App.4th 1038, 1041.) “In making this determination, courts view the evidence, including all reasonable inferences supported by that evidence, in the light most favorable to the nonmoving party.” (*Ibid.*)

“We review the trial court’s decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports.” (*LeVine, supra*, 131 Cal.App.4th at p. 572.)<sup>1</sup>

### **B. ING Failed to Establish There is No Material Issue of Fact Regarding its Claim for Breach of Contract**

YAM argues that ING failed to demonstrate two elements that are necessary to establish a claim for breach of contract. (See generally *CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239 [breach of contract requires following elements “(1) existence of the contract; (2) plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach; and (4) damages to plaintiff as a result of the breach”].) First, YAM contends that the Broker Origination Agreement did not require it to verify Ramon’s salary information and therefore ING failed to demonstrate that YAM breached

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<sup>1</sup> The same standards apply to motions for summary adjudication. (See *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 631.)

the contract. Second, YAM argues that ING did not meet its initial burden to produce evidence showing that it was damaged as a result of YAM's purported breach.

*1. ING established that YAM breached the Broker Origination Agreement*

YAM argues that the trial court erred in concluding that the submission of a loan application which misstates the borrower's income constitutes a breach of the Broker Origination Agreement. Although YAM concedes that Ramon's application contained false salary information, it contends that, under the parties' Agreement, it had no duty to independently verify Ramon's salary information.

The plain language of a contract governs its interpretation. (Civ. Code, § 1638; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) Section 10, subdivision (bb) of the Broker Origination Agreement states that YAM "shall not submit a Loan Application Package where the information contained in the application or other document submitted in connection with the loan application is not true, correct and undisputed and does not reflect full, correct and accurate information as to the matter represented." This clause does not contain any qualifying language indicative of a scienter element, such as "knowingly" or "intentionally." (See generally *Margarito v. State Athletic Com.* (2010) 189 Cal.App.4th 159, 168.) We therefore agree that the Agreement imposed an unambiguous, absolute duty on YAM to submit truthful salary information in any loan application, which it admittedly failed to do.

YAM, however, argues that other documentation in the record demonstrates that YAM was not required to verify the borrower's salary information. Specifically, YAM points to language in ING's "Lending Guidelines," which were incorporated into the Broker Origination Agreement. The Guidelines describe various terms and conditions applicable to two different types of ING financial products: "stated income loans" and "verified income loans." A "stated income loan" is "a loan where the borrower states their monthly income, and the lender will . . . accept that as the income upon which to make the loan decision" without requiring any further documentation. A "verified income loan," on the other hand, requires the applicant to submit verification of salary, including W2s or the borrower's most recent pay stub. YAM argues that ING's Lending

Guidelines explain the specific acts that are necessary to verify a borrower's income: for a stated income loan, a broker need only ask the borrower his or her income, and for a verified income loan, it must obtain a wage earning statement. In this case, YAM contends it did both things: it asked Ramon his salary, which he then verified through a wage statement. In YAM's view, compliance with the Guidelines was sufficient to discharge any duty it had to substantiate Ramon's income.

The ING Guidelines do not alter or amend the Broker Origination Agreement's requirement that YAM submit accurate and truthful loan application information. Instead, the Guidelines describe the type of documentation that ING requires a borrower to submit in support of specific types of loans. Although it appears YAM did collect sufficient information and documentation to satisfy the Guidelines' requirements, the Broker Origination Agreement imposed an independent obligation on YAM to ensure the accuracy of any loan application that it submitted to ING.

Because YAM admits the loan application misstated Ramon's salary, ING established breach.

2. *ING failed to introduce sufficient evidence to establish contract damages*

YAM next contends that, even if ING established a breach of the Broker Origination Agreement, it failed to satisfy its initial burden to introduce evidence demonstrating that it was damaged as a result of the breach. Contract damages are generally intended to “compensate[ ] the [plaintiff] for the loss of his “expectational interest” – the benefit of his bargain which full performance would have brought.’ [Citation.]” (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1144-1145.) “The ‘benefit of the bargain’ measure of damages is the difference between the actual value of what the plaintiff has received and that which he expected to receive.” (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 564.) Thus, to satisfy its initial burden under summary judgment procedures, ING was required to introduce evidence establishing that YAM's breach caused ING to receive less than what it would have otherwise received under its lending agreement with Ramon. Moreover, it had to show



there was no dispute about the total amount of its damages. (See *Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1097 [summary judgment or adjudication improper where amount of damages raises factual issue].)

In the trial court, ING introduced evidence demonstrating that Ramon stopped making his monthly loan payments, along with an account statement indicating the unpaid balance of the loan. It also introduced evidence that YAM had refused to repurchase the loan from ING, as required under the parties' broker agreement.<sup>2</sup> ING alleges that this evidence demonstrates that it has been damaged as a result of YAM's breach because it is now "stuck with a non-performing loan." The trial court agreed, concluding that "ING has been damaged in the amount of the loan plus fees paid in connection with the loan, which it would not have made but for the income representation in the loan application."

YAM, however, contends that ING has not established that it suffered damages (or the amount of any such damages) because it failed to introduce any evidence showing that Ramon's property, which was used to secure the loan, is insufficient to provide ING the full amount it would have received under its loan agreement.

It is undisputed that Ramon provided ING a deed of trust to his property to secure the loan. ING failed to come forward with any evidence indicating the current value of Ramon's property or the current status of the deed of trust. Without doing so, ING has failed to establish whether it has been damaged by YAM's breach of the Broker Origination Agreement, and if so, by how much. If ING still owns the deed of trust and is entitled to foreclose on the property, it is possible that the value of the property is equal to or greater than what ING would have received under the loan agreement. If, on the

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<sup>2</sup> Paragraph 11 of the Broker Origination Agreement includes a provision requiring that, in the event the broker (YAM) "fails to abide by any term . . . of this Agreement with respect to any Loan or Loan Application Package . . . or if any representation . . . made by Broker fails to be true, then Broker agrees to immediately repurchase, on demand, any Loan which may be affected by such failure."

other hand, ING has foreclosed and sold the property, it has not demonstrated that the amount it received did not offset all or part of its damages.<sup>3</sup>

Because ING has failed to introduce sufficient evidence proving it suffered any damages, and also failed to demonstrate the total amount of its damages, we reverse the trial court's grant of summary judgment on ING's contract claim.

### **C. There is a Material Issue of Fact Regarding ING's Fraud Claim**

YAM argues the trial court erred in concluding that there is no triable issue of fact in regards to ING's fraud claim. "Fraud is an intentional tort, the elements of which are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. [Citation.] [Citation.]" (*Intrieri v. Superior Court*. (2004) 117 Cal.App.4th 72, 85-86 (*Intrieri*).) YAM contends that there is a factual dispute whether YAM knew the loan application misstated Ramon's salary. The trial court concluded the knowledge element was satisfied by YAM's "admitted . . . failure" to take any steps to verify Ramon's salary. In the court's view, such conduct constituted "recklessness giving rise to the elements of knowledge and intent."

It is well-established that "[f]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.) Whether a party acted with actual knowledge of falsity or reckless disregard for the truth is generally a question of fact to be determined by the jury. (See *Buist v. C. Dudley De Velbiss Corp.* (1960) 182 Cal.App.2d 325, 332 [for purposes of fraud, "knowledge of party" is "question of fact"]; *Radinsky v. T. W. Thomas, Inc.* (1968) 264 Cal.App.2d 75, 80 ["Whether there has been fraud by misrepresentation is question of fact for determination by the trial court"]; *Initieri, supra*, 117 Cal.App.4th at p. 87 [triable question of fact existed as to whether

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<sup>3</sup> YAM raised this damages argument in both the trial court and its opening appellate brief. ING has never responded to the argument nor has it ever explained the status of its deed of trust.

defendant “knew the statements were false” where it is “questionable whether a reasonable person would believe” his testimony]; cf. *Cooper v. Los Angeles Terminal Railway Co.* (1902) 137 Cal. 229, 232 [whether defendant acts were “reckless . . . was for the jury to determine from all the evidence”].) Thus, a plaintiff may only obtain summary judgment on a fraud claim where he has introduced evidence “that would require a reasonable trier of fact to find [more likely than not]” that YAM had actual knowledge of falsity or acted with reckless disregard for the truth. (*Aguilar, supra*, 25 Cal.4th at p. 845.) Stated differently, summary judgment may only be granted if “undisputed facts leave no room for a reasonable difference of opinion” as to whether YAM had actual knowledge that Ramon misstated his salary or acted with reckless disregard as to the truth of his stated income. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 [discussing reliance element of fraud claim]; *Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843 [“existence of fraud . . . is a question of fact” unless reasonable people can come to only one conclusion based on the facts].)

YAM contends that the following evidence establishes a triable issue of fact as to whether it acted with actual knowledge and/or recklessness: (1) YAM introduced evidence that, at the time it submitted the loan application to ING, it was unaware that Ramon misstated his salary; (2) Ramon’s loan application stated that he was providing “true and correct” information; (3) the loan application contained language notifying Ramon that any intentional misrepresentation might subject him to civil and criminal penalties; (4) Ramon provided YAM an earnings statement that appeared to confirm the level of income stated in the application; (5) according to ING’s Lending Guidelines, an earnings statement is generally sufficient to verify a borrowers’ income, and; (6) Ramon was seeking refinance of a Chase Manhattan Mortgage loan, meaning that another lending institution had already determined he was qualified for a \$300,000 loan.

In light of this evidence, which we must interpret in the light most favorable to YAM, a reasonable trier of fact could find that YAM did not know that Ramon misstated his salary and did not act recklessly by failing to take any further actions to verify Ramon’s salary. First, there is no evidence that YAM knew Ramon misstated his salary

or had any reason to doubt the information in Ramon's loan application. Second, Ramon attested to the truth of his current income and provided documentation that appeared to verify his income. Third, ING's Lending Guidelines suggest that, if ING had originated the loan itself, it would not have required any more salary verification or documentation than what YAM gathered. Fourth, a bank had already given Ramon a sizeable loan, which he was trying to refinance. Given all of this evidence, there is a disputed issue of fact as to whether YAM had any reason to question the veracity of Ramon's application and, as a result, whether YAM acted recklessly.

#### **D. ING Failed to Establish YAM Committed Negligence**

YAM argues that ING failed to introduce evidence establishing its negligence claim. In the trial court, ING argued that federal and state statutes imposed a legal duty on YAM "to refrain from making any substantial misrepresentation" in a loan application. It further argued that because YAM submitted an application that misstated Ramon's salary, it had violated its statutory duties and therefore was negligent as a matter of law. The trial court agreed, concluding that "the undisputed facts show that YAM submitted a loan application which contained materially false information . . . in violation of several statutes." The court further ruled that these statutory duties "were specifically enacted to prevent fraud on banks such as ING, and supplement Broker's general duties of care not to submit a loan application which contains material factual misstatements."

ING cites three statutes in support of its contention that YAM had a duty of care to ensure that any information in Ramon's loan application was truthful: 18 U.S.C. section 1014, 18 U.S.C. section 1344 and California Business and Professions Code section 10176. The federal statutes cited by ING only apply where the actor knowingly makes a false statement. (See 18 U.S.C., § 1014 ["Whoever knowingly makes any false statement . . ."]; 18 U.S.C., § 1344 ["whoever knowingly executes . . . scheme . . . [] to defraud a financial institution . . ."].) Business and Professions Code section 10176, on the other hand, permits the State to suspend or revoke a real estate license if the licensee commits various enumerated acts of dishonesty, including making "any substantial misrepresentation" or engaging in "any other conduct . . . which constitutes fraud or

dishonest dealing.” (Bus. & Prof. Code, § 10176, subds. (a), (j).) Section 10176 only applies to misrepresentations that are known to be false or are made with reckless disregard for their truth. (See generally *Nichandros v. Real Estate Division of Dept. of Inv.* (1960) 181 Cal.App.2d 179, 183.) As we have explained, the evidence raises a triable issue of fact regarding whether YAM acted with knowledge or recklessness. Therefore, the evidence does not establish, as a matter of law, that YAM breached its statutory duties nor does it establish that YAM committed negligence by violating the statutes.<sup>4</sup>

### **DISPOSITION**

The trial court’s judgment in favor of ING is reversed and the case is remanded for further proceedings. YAM to recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.

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<sup>4</sup> The trial court also concluded that because ING established YAM violated federal and state law, there was no triable issue of fact on ING’s unfair business practice under Section 17200:

The Court finds that it is undisputed that YAM submitted a loan application to ING which contained materially false representations as to the borrower’s income. YAM’s submission of that loan application was both an unlawful act and a fraudulent act. The misrepresentations as to the borrower’s income for the purpose of securing a loan violates 18 U.S.C §§ 1344 (bank fraud) and 1014 (false statement in a loan application) and therefore violates the unlawful and fraudulent prongs of a breach of the California Unlawful Business Practices Act.

Because we reverse the trial court’s finding that ING’s evidence demonstrates YAM violated a statutory duty, we also reverse the court’s decision that YAM violated Section 17200.